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No. 02-0927

IN THE SUPREME COURT OF THE UNITED STATES

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EDWIN EDWARDS AND STEPHEN EDWARDS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

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# BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Sixth Amendment right to an impartial, unanimous verdict is violated when a court, after extensive inquiry during the deliberations themselves, dismisses a juror who it knows to be leaning towards acquittal, despite the possibility that the juror's dismissal has been sought (and ultimately granted) because of his views of the evidence.

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## BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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This *amicus curiae* brief is submitted in support of the petition for a writ of certiorari filed by petitioners Edwin Edwards and Stephen Edwards. The consents of the parties are submitted with the brief in accordance with Sup. Ct. R. 37.2(a).[1/]

## INTEREST OF *AMICUS CURIAE*

The NACDL is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

The NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

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[1/] As required by Rule 37.6 of this Court, *amicus curiae* submits the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

The NACDL rarely participates as *amicus* at the petition stage. It does so in this case--as it did in *United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001), *cert. denied*, 123 S. Ct. 74 (2002), which involved substantially the same question--because the issue presented has transcendent and recurring importance, and because, in our judgment, the court of appeals' decision threatens to undermine the crucial protections of the Sixth Amendment right to trial by jury and to invite trial courts to invade the secrecy of jury deliberations. We believe that the perspective of our members, who regularly represent criminal defendants in federal and state trial courts, will be useful to the Court.

## REASONS FOR GRANTING THE WRIT

The Court should grant the writ of certiorari because the court of appeals' decision demonstrates the need for clear limits on a district court's power to investigate alleged juror misconduct, in the middle of jury deliberations, based on allegations from one faction of jurors that another juror--typically a holdout--will not deliberate.

Some courts in these circumstances have refused to sanction such investigations unless a stringent evidentiary threshold has been satisfied. *See, e.g., United States* v. *Symington*, 195 F.3d 1080 (9th Cir. 1999); *United States* v. *Thomas*, 116 F.3d 606 (2d Cir. 1997); *United States* v. *Brown*, 823 F.2d 591 (D.C. Cir. 1987). Other courts, by contrast--including *Abbell* and the court of appeals in this case--have granted district courts substantial and, in our view, unwarranted leeway to conduct investigations of deliberating jurors. *See, e.g., United States v. Baker*, 262 F.3d 124, 129-32 (2d Cir. 2001); *People v. Cleveland*, 21 P.3d 1225 (Cal. 2001). The Court should take this opportunity to establish clear and strict standards that must be satisfied before a district court may undertake such an investigation.

## I. THE *BROWN*, *THOMAS*, AND *SYMINGTON* STANDARD FOR INVESTIGATION AND REMOVAL OF A DELIBERATING JUROR.

An investigation into the inner workings of a deliberating jury conflicts squarely with the principle--manifested, for example, in Fed. R. Evid. 606(b)--that jury deliberations must remain secret. Courts have recognized that "[o]nce a jury retires to the deliberation room, the presiding judge's duty to dismiss jurors for misconduct comes into conflict with a duty that is equally, if not more, important--safeguarding the secrecy of jury deliberations." *Thomas*, 116 F.3d at 618.

The Second Circuit declared in *Thomas* that "[t]he secrecy of deliberations is the cornerstone of the modern Anglo-American jury system." *Id.* The assurance that juries deliberate in secret, immune from inquiry by the court or the parties, promotes free, open, and candid debate among the jurors. *See, e.g., Tanner* v. *United States*, 483 U.S. 107, 124 (1987) ("[C]ommon fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts.") (quoting legislative history of Rule 606(b)). Indeed, a trial court may "invite[] reversible error" when it investigates "internal influence occurring during deliberations." *United States* v. *Prosperi*, 201 F.3d 1335, 1340-41 (11th Cir. 2000) (citing Fed. R. Evid. 606(b)).

Judicial intrusion into deliberations presents two principal dangers. First, "if trial judges were permitted to inquire into the reasoning behind jurors' views of pending cases, 'it would invite trial judges to second-guess and influence the work of the jury.'" *Symington*, 195 F.3d at 1086 (quoting *Thomas*, 116 F.3d at 620); *see, e.g., Cleveland*, 21 P.3d at 1231 ("Jurors may be particularly reluctant to express themselves freely in the jury room if their mental processes are subject to immediate judicial scrutiny. The

very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations."). Second, "a trial judge's examination of jury deliberations risks exposing those deliberations to public scrutiny. Such exposure, in turn, would jeopardize the integrity of the deliberative process." *Symington*, 195 F.3d at 1086.

The *Brown*, *Thomas*, and *Symington* courts assigned such great weight to the value of secret deliberations that they adopted an evidentiary standard designed expressly to protect the sanctity of the jury room. Those courts held that "if the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." *Thomas*, 116 F.3d at 621-22 (emphasis added); *see Brown*, 823 F.2d at 596 (same); *cf. Symington*, 195 F.3d at 1087 ("any reasonable possibility"). Under the "any possibility" standard, "[a] presiding judge faced with anything but unambiguous evidence that a juror refuses to apply the law as instructed need go no further in his investigation of the alleged nullification; in such circumstances, the juror is not subject to dismissal on the basis of his alleged refusal to follow the court's instructions." *Thomas*, 116 F.3d at 622.

As this language suggests, the *Brown/Thomas* standard serves two functions. First, it establishes an evidentiary threshold that must be crossed before the district court can investigate a claim of nullification or refusal to deliberate; that is, the court may not undertake an inquiry as long as there is "any possibility" that a complaint about a juror stems from his view of the evidence. *See id.*; *see also Symington*, 195 F.3d at 1087 (when there is any reasonable possibility that the impetus for dismissal stems from the juror's views on the merits of the case, "the trial judge has only two options: send the jury back to continue deliberating or declare a mistrial"). As *Thomas* observes, the "any possibility" standard "protects not only against the wrongful removal of jurors; it also

serves to protect against overly intrusive judicial inquiries into the substance of the jury's deliberations." 116 F.3d at 622. Second, *Brown* and *Thomas* establish a substantive rule for determining when a juror may be dismissed under Rule 23(b) for nullification; dismissal may occur only when there is no possibility that the complaints about a juror's conduct result from his position on the merits.

This case--like *Abbell* and other recent cases--illustrates the dangers that the *Brown/Thomas* standard serves to prevent. After six days of deliberations, some jurors accused Juror 68 of being "biased" and "refus[ing] to participate in deliberations." Principally on the basis of this allegation, the district court launched a highly intrusive inquiry that interrupted deliberations and included four interviews of the foreman, repeated interviews of Juror 68, and interviews of a number of other jurors. This inquiry, triggered by the allegation of bias, inevitably signalled to the other jurors that the district court found Juror 68's firmly held view of the evidence somehow suspect. The district court's investigation ultimately produced "evidence" of entirely trivial violations of the court's instructions, which then served as the ostensible basis for dismissing the juror. Such an extraordinarily intrusive investigation inevitably "bring[s] to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded." *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926).

## II. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH *BROWN*, *THOMAS*, AND *SYMINGTON* AND UNDERSCORES THE NEED FOR CLARIFICATION OF THE STANDARD FOR INVESTIGATING AND REMOVING JURORS DURING DELIBERATIONS.

The Fifth Circuit's decision conflicts with *Brown*, *Thomas*, and *Symington* and substantially weakens the protections they afford the Sixth Amendment jury trial right. The decision--particularly in conjunction with the Eleventh Circuit's recent decision in *Abbell*--underscores the need for this Court to clarify the standard for investigating and removing deliberating jurors.

The Fifth Circuit disregarded the holding of *Brown*, *Thomas*, and *Symington* that the district court may not initiate an investigation during deliberations when the complaint about a juror potentially rests on his view of the evidence. App. 47-48. The note that the district court received from the foreman on May 1 clearly raised that possibility; the note asserted, for example, that Juror 68 "is biased"and "has his mind made up." Under *Brown*, *Thomas*, and *Symington*, therefore, that note did not permit the district court to undertake further investigation. The district court's questioning of the foreperson--which then led to its "investigation" of Juror 68's alleged violation of the court's instructions--cannot be sustained under the *Brown/Thomas* standard, and the court of appeals' approval of that investigation conflicts squarely with those decisions.

The Fifth Circuit effectively turned the *Brown/Thomas* standard on its head; the court cited the "ambiguous" nature of the foreman's bias allegation as a reason to *proceed* with the investigation. App. 48. But *Brown*, *Thomas*, and *Symington* make clear that when an allegation against a deliberating juror is ambiguous--when there is "any possibility" that the allegation rests

on the juror's view of the evidence--then the district court cannot inquire further. At that point, the court "has only two options: send the jury back to continue deliberating or declare a mistrial." *Symington*, 195 F.3d at 1087. By resolving ambiguity in favor of investigation, contrary to *Brown*, *Thomas*, and *Symington*, the Fifth Circuit overlooked the trial court's "equally, if not more, important [duty]--safeguarding the secrecy of jury deliberations." *Thomas*, 116 F.3d at 618. The district court's interrogation of the foreman, Juror 68, and ultimately the remaining jurors improperly exposed the jury's deliberations to scrutiny.[2/]

The Fifth Circuit here--like the Eleventh Circuit in *Abbell* and the California Supreme Court in *Cleveland*-- underestimated the dangers that an investigation of juror misconduct presents during deliberations when there is any possibility that the inquiry stems from the juror's view of the evidence. If the trial court has the discretion to launch an inquiry into alleged bias and refusal to deliberate--as the district court did here--"the threat of an interview

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[2/] The Fifth Circuit declined to apply the *Brown/Thomas* substantive standard for removing jurors on the basis that those decisions merely restrict dismissals of jurors based on nullification. App. 44-46. In *Baker*, a panel of the Second Circuit similarly attempted to distinguish *Thomas* on the basis that it involved nullification, while *Baker* considered a "refusal to engage in the process of jury deliberation." 262 F.3d at 132. But a recent district court decision illustrates the impossibility of distinguishing between nullification on one hand and a purported refusal to deliberate on the other. *See United States v. Samet*, 207 F. Supp. 2d 269 (S.D.N.Y. 2002); *see also Symington*, 195 F.3d at 1085-87 (analyzing removal of juror for refusal or inability to deliberate under the *Brown/Thomas* standard). In this respect as well, this Court's clarification is needed.

with the judge could be used by those jurors who seek to convince a holdout to go along with the majority's position." Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877, 950 (1999). The possibility of such an interview may also chill deliberations; jurors--particularly those in the minority--will be reluctant to state their views for fear that the majority will report their words to the court as evidence of bias or a refusal to consider the views of other jurors. *See id.* And an inquiry by the court into the basis for a particular juror's views, no matter how delicate, inevitably will convey to the jury that the court disapproves of those views. The remaining jurors--who know the position of the juror under investigation--may well conclude that the court finds that position unreasonable. Such a conclusion would have a powerful impact on the jury, and particularly on any other holdout jurors.

Apart from deepening the circuit split over the proper standard for initiating an investigation of a deliberating jury, the court of appeals' decision represents unwise policy. The institutional pressure on trial judges to complete cases and move their dockets provides a powerful incentive for a court faced with an ambiguous record to seize upon any basis to investigate and remove a holdout juror. *See id.* at 951. This case illustrates that pressure. After a lengthy trial and prolonged deliberations, the district court launched an investigation based on a juror's asserted bias and failure to deliberate and, when that allegation proved baseless, ultimately dismissed the juror based on alleged improprieties that are, by any objective standard, utterly trivial. To ensure protection of the defendant's constitutional and statutory right to a unanimous verdict in the face of these institutional pressures, the Court should take the opportunity to articulate strict limits on a district court's power to investigate alleged misconduct by a deliberating juror.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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